PP

v.

KARTHISELVAM VENGATAN

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
VINCENT NG JCA
[CRIMINAL APPEAL NO: J-05-15-2008]
11 MAY 2009

CRIMINAL LAW: *Penal Code - Section 304 - Reduced charge - 13 years' imprisonment - Whether adequate*

CRIMINAL PROCEDURE: *Sentence - Imprisonment - 13 years for reduced charge under s. 304 Penal Code - Whether adequate*

CRIMINAL PROCEDURE: *Plea of guilty - Plea bargaining - Whether court involved in plea bargaining process - Whether accused misled as to consequence of his guilty plea to lesser charge - Penal Code, s. 304*

The respondent who was originally charged under s. 302 of the Penal Code pleaded guilty to a reduced charge under s. 304 of the same and was sentenced to 13 years' imprisonment. The prosecution appealed against the years of imprisonment imposed. The respondent argued that he pleaded guilty to the reduced charge because his counsel informed him that he would receive a 13-year imprisonment if he did so.

Held (allowing the appeal):
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The sentence passed by the learned judge was manifestly inadequate having regard to the facts and circumstances of the case, particularly the gruesome way in which the death of the deceased was caused by the respondent and the absence of any truly mitigating circumstances. The learned judge failed to have sufficient regard to public interest when determining the measure of sentence imposed. A sentencing court should strike a balance between the interests of the public and the interests of the accused. Further, the fact that the respondent pleaded

guilty appeared to have influenced the learned judge in imposing the sentence. A plea of guilt should not be taken to automatically entitle an accused to a reduction in sentence. The evidence from the facts of the case overwhelmingly supported the conviction of the respondent. (para 4)

(2) The facts showed that the court below was not involved in any plea bargaining process. Also, there was nothing to suggest that the respondent was misled as to the consequence of his plea (See *New Tuck Shen v. PP*). The learned judge had therefore erred in imposing the 13-year imprisonment. There was no alternative but for this court to intervene and enhance the sentence. (para 6)

[Imprisonment enhanced to 20 years' imprisonment.]

Bahasa Malaysia *Translation Of Headnotes*

Responden, yang pada asalnya dituduh di bawah s. 302 Kanun Keseksaan, mengaku bersalah kepada pertuduhan yang dikurangkan kepada s. 304 Akta yang sama dan dihukum penjara selama 13 tahun. Pihak pendakwaan merayui tempoh hukuman penjara tersebut. Responden berhujah bahawa dia mengaku bersalah kerana dimaklumkan kaunselnya bahawa dia akan menerima hukuman 13 tahun penjara jika berbuat demikian.

Diputuskan (membenarkan rayuan):
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Hukuman yang dikenakan oleh yang arif hakim ternyata tidak mencukupi memandangkan fakta dan keadaan kes, terutamanya cara ngerinya kematian si mati disebabkan responden dan ketiadaan apa-apa faktor peringanan yang sebenarnya. Yang arif hakim gagal memberi pertimbangan mencukupi terhadap kepentingan awam apabila menentukan tempoh hukuman. Mahkamah yang memberi hukuman semestinya memberi imbangan betul di antara kepentingan awam dengan kepentingan tertuduh. Lagi, rayuan bersalah tertuduh nampaknya mempengaruhi yang arif hakim dalam pemberian hukuman tersebut. Satu rayuan bersalah tidak semestinya memberikan hak kepada tertuduh untuk hukumannya dikurangkan secara automatik. Dalam kes semasa, keterangan daripada fakta kes jelasnya menyokong sabitan responden itu.

(2) Fakta kes menunjukkan bahawa mahkamah bawah tidak terlibat dalam proses tawar-menawar akuan bersalah. Juga, tiada apa untuk mencadang bahawa responden salah mengerti akibat akuan bersalahnya (Lihat *New Tuck Shen v. PP*). Dengan itu, yang arif hakim berkhilaf mengenakan hukuman penjara 13 tahun itu. Tiada alternatif lain bagi mahkamah ini tetapi untuk masuk campur dan menambahkan tempoh hukuman penjaranya.

[Hukuman penjara ditambahkan sehingga 20 tahun.]

Case(s) referred to:
Fu Foo Tong v. PP [1995] 1 SLR 448 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
New Tuck Shen v. PP [1982] 1 MLJ 27 ***(refd)***

Legislation referred to:
Penal Code, ss. 302, 304

For the appellant - Devanandan S Subramaniam; A-G's Chambers
Respondent - In person

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-17-2007]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] The respondent before us was originally charged with an offence of murder under s. 302 of the Penal Code. However, when the case against him came up before the High Court on 14 January 2008, the charge was amended to one under s. 304 of the Code. The respondent pleaded guilty to that charge. He was convicted and sentenced to a term of 13 years imprisonment from the date of his arrest. The public prosecutor being dissatisfied with the measure of punishment appealed to us. We allowed the appeal and enhanced the sentence to 20 years imprisonment from the date of arrest. The reasons for our decision are now produced.

[2] We begin by reminding ourselves of the principles guiding a court of appeal in a matter of this nature. The measure of sentence that should be imposed in a given case is a matter of discretion for the sentencing court. An appellate court should not therefore intervene unless the court below has erred in principle, that is to say, it took into account irrelevant considerations or failed to take into account relevant considerations or passed a sentence that is manifestly excessive or manifestly inadequate or not permitted by law. In short, an appellate court has no original discretion of its own but may only act when sentencing court has gone wrong in the sense just discussed.

[3] The complaint before us is that the High Court erred because it failed to take into account relevant considerations. Among these were the gruesome way in which death was caused and the fact that the respondent profited from the crime in that he stole money from the deceased. The statement of facts tendered by the prosecution and admitted by the accused reveal that the accused smashed the deceased's head with a grinding stone whilst the latter was asleep because he was afraid that the deceased would discover the theft.

[4] In our judgment, the sentence passed by the court below is manifestly inadequate having regard to the foregoing facts and circumstances, particularly the gruesome way in which death was caused and the absence of any truly mitigating circumstances. It is also our respectful view that the High Court failed to have sufficient regard to the public interest when determining the measure of sentence in this case. And it cannot be over-emphasised that a sentencing court should "strike a balance, as far as possible, between the interests of the public and the interests of the accused." (*Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256, per Hashim Yeop A Sani). Lastly, the fact that the accused pleaded guilty appears to have influenced the court below to impose the sentence it did. However, it must always be remembered that a plea of guilt should not be taken to automatically entitle an accused to a reduction of sentence. As Karthigesu JA said in *Fu Foo Tong v. Public Prosecutor* [1995] 1 SLR 448:

> It is not axiomatic that every plea of guilty 'entitles', as it was contended by counsel to a discount of between one-quarter to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction.

It is quite apparent from the facts already set out earlier in this judgment that the evidence in this case overwhelmingly supports the conviction of the accused.

[5] The respondent who appeared in person before us argued that he pleaded guilty to the reduced charge because he was informed by his counsel that if he pleaded guilty to the lesser charge he would receive 13 years imprisonment. When this was put to the learned deputy, he informed us that there was nothing in his record to show that there had been a plea bargaining in the court below in consequence of which the accused had pleaded guilty. Similarly, there is nothing the appeal record provided to us to show that the court had played a role in the bargaining of a plea. In this context we find it sufficient to refer to the judgment of Wan Yahya J (as he then was) in *New Tuck Shen v. Public Prosecutor* [1982] 1 MLJ 27 where, after discussing some of the authorities on the subject, he said:

> In all the aforementioned cases plea bargaining has been accepted as a successful ground for appeal where the bargaining involves the court and the accused. Understandably where an accused person has been given the impression that the judge is a party to the bargain, he has no reason to doubt the authority and veracity of that promise. Plea bargaining has been judiciously disapproved in the British Courts because such practices often give rise to the implication of duress, pressure, prejudice and breach of promise by the judges. Recent cases have shown that the appellate courts will only interfere with the judgment of the trial court where there existed evidence of plea bargaining between the court and the defence.

And in a later passage he added:

> Plea bargaining between the prosecution and defence could only form ground for appeal if the appellant has been misled as to the consequence of his plea. As this is a latent fact peculiarly in his knowledge, it is for him to satisfy the court that he has been labouring under such a mistaken belief of law or fact at the time when he pleaded guilty to the charge.

A **[6]** Now, applying what was said by the very learned judge in *New Tuck Shen* to the facts of the instant case, two matters appear patently clear to us. First, the court was not involved in any plea bargaining process. Second, that there is not an iota of material before us to suggest that the accused was misled as to the
B consequence of his plea. In these circumstances, having come to the conclusion that the High Court had erred in imposing the sentence it did, we had no alternative but to intervene and enhance the sentence.

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